No. 14,562

IN THE

United States Court of Appeals

For the Ninth Circuit

LIBBY, MCNEILL & LIBBY (a corporation) and YAKUTAT & SOUTHERN RAILWAY (a corporation),

Appellants,

vs.

CITY OF YAKUTAT, ALASKA (a municipal corporation),

Appellee.

BRIEF FOR APPELLANTS.

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Subject Index

Case No. 14,562

NB: For the Court's convenience and inasmuch as the trial Court said it would consider all the evidence before it in Case No. 13,455 (Volume 1 PR herein; lower Court No. 6581-A), Appellants here reprint their Subject Index in their main brief in Case No. 13,455.

Subject Index

Case No. 13,455.

Table of Authorities Cited

Case No. 14,562.

NB: For the Court's convenience, Appellants here relist the authorities cited in and the page references thereto in their Brief in Case No. 13,455.

Table of Authorities Cited

Case No. 13,455.

Table of Statutes, Ordinances and Rules

Case No. 14,562.

NB: For the Court's convenience, Appellants here relist the Statutes cited and the page references thereto in their Brief in Case No. 13,455.

Statutes

Case No. 13,455.

Table of Texts

Case No. 14,562.

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Texts

Case No. 13,455.

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BRIEF FOR APPELLANTS.

Appellants contend that this is the identical proceedings that was before this Honorable Court in its Case No. 13,455 plus such further errors as the trial Court committed since this Court issued its Mandate (PR 335-337) on August 19, 1953, and that the same facts and legal principles are involved plus such additional facts and legal principles as are involved in those further errors.

Inasmuch as the Clerk on January 27, 1955, informed Appellants that the Court had granted their petition to use and adopt herein their brief in Case

No. 13,455, they hereby do so as a supplement or appendix hereto and, to save space, will refer thereto as Bf. 13,455, p. so and so. The Transcript of Record in Case No. 13,455 is identical with Volume I of the Transcript of Record herein. Volume II of the Transcript of Record herein embraces the proceedings, commencing with this Court's Mandate (PR 335-337) of August 19, 1953, in Case No. 13,455 up to the docketing of this appeal. The parties are the same.

STATEMENT OF PLEADINGS AND FACTS.

A. Jurisdictional Statutes.

See: Bf. 13,455, pp. 1-22.

B. Pleadings.

See: Bf. 13,455, pp. 22-36, for pleadings before this Court on first appeal upon the basis of which the trial Court entered the "Order of Sale" (PR 50) of April 25, 1952, which this Court reversed by its Opinion of July 8, 1953 (206 F2d 612), and which pleadings supplemented by the further hereinafter mentioned pleadings were again before the trial Court on June 24, 1954, resulting in entry of the "Order of Sale" (PR 388-389) of June 29, 1954, from which this appeal is taken.

C. Proceedings subsequent to this Court's Mandate of August 19, 1953, in Case No. 13,455 (PR 335-337).

Under date of October 7, 1953, Appellants moved to file, and for judgment on, this Court's mandate of August 19, 1953 (PR 337-338).

On January 8, 1954 (PR 408), the trial Court said the motion was granted.

On April 28, 1954, Appellants reminded (PR 409) the trial Court that it had not signed the judgment on the mandate, whereupon Appellee, at its request, was given time to file objections to the judgment on the mandate. Its counsel stated: "We have taken the money we have gotten and applied it to the personal property taxes and also gave him credit for his costs" and admitted Appellants had protested strongly against that procedure (PR 411).

Appellee filed its objections on May 6, 1954, to Appellants' proposed judgment on the mandate (PR 340).

On May 12, 1954, nunc pro tunc May 8, 1954, the trial Court overruled Appellee's objections to entry of judgment on the mandate, saying that the costs taxed by this Honorable Court could not be applied or credited by Appellee upon the taxes, personalty or realty, penalty and interest, or any part thereof, which Appellee claimed were due it from Appellants (PR 342-343).

On May 8, 1954, the trial Court entered judgment on this Court's mandate (PR 339).

On May 10, 1954, Appellee moved that this proceedings be set down for hearing on May 11, 1954, or that the evidence of the City Clerk be preserved (PR 340-341), at which time Appellants in open Court contended this Honorable Court's mandate (PR 335-337) in Its Cause No. 13,455 was final (PR 413).

Over Appellants' objections (PR 415-421) the trial Court on May 11, 1954, set this proceedings for rehearing on June 24, 1954 (Sup. PR 350a).

On May 12, 1954, Appellee served and filed its motion (PR 341-342) to suppress certain parts of the printed record in this Court's Case No. 13,455, and gave written notice of taking on written interrogatories the deposition of Dorothy Henry on May 24, 1954, in Yakutat (PR 345).

On May 21, 1954, Appellants served and filed their written Objections to that notice and to Appellee's written interrogatories (PR 343-344).

Without awaiting the trial Court to rule on those Objections, Appellee took Dorothy Henry's deposition (PR 345-350) producing a document (PR 347) on its face entitled "City of Yakutat Tax and Assessment Roll No. 5" whose defects will be later pointed out (Infra, pp. 21-26).

On May 25, 1954, filed Dorothy Henry's deposition with the Clerk of the trial Court and on May 26, 1954, mailed Appellants' attorney a notice of such filing, which notice Appellants received on May 28, 1954 (PR 350).

On May 28, 1954, Appellants served and filed their motion (PR 355-356) to suppress Dorothy Henry's deposition (PR 345), and their Objections (PR 357-359) to Appellee's Motion (PR 341-342) to strike certain portions of the printed record of this Court's Case No. 13,455, and their Motion (PR 351-353) to vacate the trial Court's order, entitled "Order Short-

ening Time," of May 11, 1954, setting this proceeding for new trial on June 24, 1954 (Sup. PR 350a).

Judge Folta then holding Court in Anchorage, on May 29, 1954, Appellants gave notice (PR 359-360) that they would present in Anchorage on June 4, 1954, their Motion (PR 351-353) to vacate order entitled "Order Shortening Time" (Sup. PR 350a), and their Objections to Appellee's Motion (PR 357-359) to strike certain portions of the printed record of this Court's Cause No. 13,455, and their motion (PR 355-356) to suppress Dorothy Henry's deposition, and their Objections (PR 343-344) to Appellee's notice of taking, and its written interrogatories in, Dorothy Henry's deposition.

Appellants, then having learned that neither Judges Folta nor McCarrey were in Anchorage, and that Judge Pratt would not hear motions in Fairbanks prior to June 11, 1954, served and filed their amended notice (PR 362-364) that they would present their said Motions and Objections to Judge Folta or to such District Judge as was in Anchorage on June 10, 1954, or as soon thereafter as a judge was there available.

Attorney Raymond E. Plummer, on behalf of Appellants, presented their said Motions and Objections to Judge Folta on June 11, 1954, (PR 424-434), resulting in his entering a minute order on June 12, 1953, viz.:

> The Appellants' "several motions are denied without prejudice to a renewal thereof upon failure of the applicant to present a new duplicate delinquent tax roll on or before June 24." (PR 365.)

On June 23, 1954 (PR 371-379), Appellants renewed their several motions and objections, and while preparing that Renewal were served with Appellee's pretended "Amended Supplemental Delinquent Tax Roll for 1949" (PR 369-370), which Appellants immediately moved to strike (PR 379-381), and which was certified and signed in the name of the City Clerk by its Municipal Attorney and which was dated June 23, 1954, the day before the new trial started, all of which motions and objections Appellants submitted to the trial Court on June 24, 1954, and objected to its jurisdiction to retry this proceeding (PR 435), at which hearing Appellee's counsel stated that he was raising a new legal issue, i.e.: "The new legal issue is that" Appellants "did not exhaust their administrative remedy, and, therefore, have no standing before this Court at all;" (PR 449) at which hearing the Court took into consideration all of the record (Minute Order, June 29, 1954 (PR 406, also 456), shown in this Court's Case No. 13,455, Appellee's Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370), Dorothy Henry's deposition with document, Exhibit 2, which she said was a true copy of the Appellee's Assessment Books and Tax Roll (PR 345-350) and all of Appellants' several motions and objections (PR 435) previously submitted to Judge Folta on June 11, 1954, in Anchorage (PR 424-434, also 456, 458).

On June 25, 1954, the learned trial Court filed its written Memorandum Decision (PR 382), whereupon Appellants served and filed their Objections to Order

of Sale (PR 384-387), but on June 29, 1954, the trial Court entered its Order of Sale (PR 388-389).

On July 2, 1954, Appellants served and filed their Motion for New Trial (PR 390-394).

On July 28, 1954, in open Court Appellee's counsel admitted, in accordance with Appellants' Motion to Amend or Alter the Minute Order of June 29, 1954 (PR 390), that Appellants' objections, stated in their motion (PR 379-380) of June 23, 1954, to strike Appellee's Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370), were correct in fact, but that Appellee didn't admit Appellants' legal conclusions in those objections or the validity of the objections (PR 460).

On July 28, 1954, the trial Court denied Appellants' Motion for New Trial (PR 463).

On July 30, 1954, Appellants served and filed their Notice of Appeal (PR 395-396) from the Order of Sale of June 29, 1954 (PR 388-389) and from the order made on July 28, 1954, denying their Motion for New Trial (PR 463).

Appellants filed their Supersedeas on July 30, 1954, which was approved and appeal allowed and order of sale stayed on that date by the trial Court (PR 396-399).

Appellants docketed their appeal with the Clerk of this Court on October 25, 1954, the time having been extended, because of the absence of or business pressure on the Official Court Reporter, by the trial

Court's orders of August 31, 1954, (PR 400) and October 6, 1954, until October 28, 1954 (PR 401-402).

FACTS.

See: Bf. 13,455, pp. 36-49, for Facts involved in first appeal, which facts were again before the trial Court, together with the further hereinafter mentioned facts, at the hearing on June 24, 1954.

Further Facts Before Trial Court at Hearing on June 24, 1954.

At the retrial on June 24, 1954, the trial Court considered all the evidence introduced in support of the Appellants' objections (PR 456, 458) which was before this Court in Case No. 13,455, so the only new matters, other than Appellants' Motions and Objections in Volume II Transcript of Record herein (pp. 4-6, supra), were: (a) City Clerk Henry's testimony by deposition (PR 345-350), including a document (PR 347) which she termed to be a true copy of Appellee's assessment book; (b) Appellee's pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370); and the admission by Appellee (PR 460) of the correctness of the facts, but not of any legal conclusions or the validity of the objections stated in Appellants' Motion to Strike (PR 379-381) said pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370), which motion epitomized is: that said pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370)

was not prepared, presented, authorized, or noticed in accordance to, and did not in any manner comply with, the statutory provisions of Sections 16-1-121 through 130, ACLA 1949, or Appellee's tax ordinances, and was not a new duplicate delinquent tax roll for 1949 in any manner conforming with either said statutes or ordinances, nor was any notice published or posted for any period of time whatsoever of its presentation to the trial Court nor was any application filed for an order of sale thereon, and William L. Paul, Jr., neither as municipal attorney nor otherwise, had any authority under said statutes or ordinances, or otherwise, to prepare, present, or sign it, and Appellee's tax ordinances contained no provision for the payment of 1% or any other interest upon the claimed or any alleged delinquent taxes, and that the trial Court was without authority or jurisdiction to entertain or consider said Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370) or to permit in any manner either by aliunde evidence or otherwise amendment or modification of the duplicate delinquent tax roll (PR 10, 13) that was before it when it entered its Order of Sale of April 25, 1952 (PR 50), and that neither Sec. 16-1-122, ACLA 1949, nor any other statute authorized or empowered Appellee or its Board of Trustees to make up or present an amended supplemental tax roll, and Appellee's tax ordinances did not provide that the Clerk or any other official should make up and present an amended supplemental tax roll for 1949 or any other year, and neither Sec. 16-1-122, ACLA 1949, nor any other

statute authorized or empowered Appellee to make up or present an amended supplemental tax roll for any tax year after the duplicate delinquent roll for that year had been made and presented to the trial Court with an application for sale, or authorized or empowered Appellee to present to the trial Court for an order of sale an application, as in this proceeding, which application was made more than 3 years prior to the purported amended supplemental tax roll (PR 369-370), (whose purported taxes, penalty and interest are sought to be made a lien upon Appellant Yakutat & Southern Railway's real property), nor was Appellee's corporate seal affixed to the purported amended supplemental tax roll (PR 369-370), nor was it endorsed under the hand of the Clerk (inadvertently in their Motion Appellants said "Court" instead of "City"), nor was its original filed or on file with the City Clerk, nor was proof made of either publishing or posting any notice of application to the trial Court for an order of sale on the purported amended supplemental tax roll (PR 369-370).

All of these admitted facts show noncompliance not only with Sections 16-1-122 and 123, ACLA 1949, but also with Appellee's Tax Ordinances, Exhibits A and B (PR 85-104).

The pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370) claims delinquent real property taxes alone of $1,988.29, whereas the Supplemental Duplicate Delinquent Tax Roll (PR 10, 13), which this Honorable Court in its Opinion (206

F2d 612) of July 8, 1953, held to be invalid, claimed delinquent combined real and personal property taxes of $1,909.38, or $78.91 less than what is now claimed for real property taxes alone.

The pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370) like the Supplemental Duplicate Delinquent Tax Roll (PR 10, 13), makes no segregation of ownership, but assessed the real property against both Appellants, in the assessed amount of $193,695.00, whereas on the document (PR 347), produced by witness Henry, in a column headed "Board", without any dollar sign, "11,000" appears on the same line as "Land" and "176,625" appears on the same line as "Improvements". 11,000 plus 176,625 make "187,625", not "$193,695.00".

On that document are no figures for the year 1949 in the Column headed "Assessor's", clearly showing that the pretended assessment was not made by the Assessor, but if at all by Appellee's the Board of Trustees. Sections 2, 3, 4, and 5, Appellee's Tax Ordinance, Exhibit A (PR 85-88), created the office and prescribed the duties of Assessor, and Section 3 (PR 86) specifically prescribed that the Assessor should make the assessment, and was in effect during the tax year 1949 according to Appellee's Complaint in Cause No. 6302-A (PR 81, 82, 83). Moreover, at the January 18, 1952, hearing Appellee's witness Mallott testified Appellee had an assessor for 1949 (PR 223). No evidence as adduced of any contrary Ordinance, or even Resolution. This honorable Court's Case No. 14,561, shows that Appellee's counsel admitted

that that Ordinance was still in effect during 1949, 1950, and 1951 (PR Case No. 14,561, pp. 245, 246). Nor was any evidence adduced that any assessor swore that the assessment contained a full, true and correct, or any, assessment of any taxable property as prescribed by Sec. 4, Appellee's Tax Ordinance (PR 87), nor of any notice given to Appellants that Appellant Yakutat & Southern Railway's real property had been assessed at a valuation of $193,695.00 (PR 369).

QUESTIONS PRESENTED.

Appellants contend that this Appeal presents the same three questions (See Bf. 13,455, pp. 49-50) as the first Appeal presented in their Points 1-14 (PR 320-323; 475-479) plus, to cover the further errors committed by the trial Court and Appellants' further Points 15-26 (PR 479-482), three further questions, and that the first three questions (Bf. 13,455, pp. 49-50) apply with equal, if not greater force, not only to the pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370) as they did to the Supplemental Duplicate Delinquent Tax Roll (PR 10, 13) but also to the Order of Sale (PR 388-389) of June 29, 1954, as they did to the Order of Sale (PR 50-51) of April 25, 1952, which this Honorable Court reversed by its Opinion of July 8, 1953 (206 F2d 612).

FURTHER QUESTIONS PRESENTED.

Fourth—Appellee's witness Henry's testimony, with its documentary evidence (PR 345-350), was incompetent and inadmissible to extrinsically either impeach or show facts not disclosed by either the Supplemental Duplicate Delinquent Tax Roll (PR 10, 13), which this Honorable Court held was invalid in its Opinion of July 8, 1953 (206 F2d 612), or the pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370, upon which the trial Court based its Memorandum Decision (PR 382-383), filed June 25, 1954, and its Order of Sale (PR 388-389) of June 29, 1954.

Fifth—The trial Court was without jurisdiction to try this proceeding de novo, and this Honorable Court's Mandate (PR 335-337) of August 19, 1953, issued in Case No. 13,455, and the trial Court's judgment on Mandate (PR 339) of May 8, 1954, were res judicata and this Honorable Court's Opinion of July 8, 1953, (206 F2d 612) is the law of the case.

Sixth—The Order of Sale (PR 388-389) of June 29, 1954, erroneously allowed interest on claimed delinquent taxes although Appellee's Tax Ordinances fixed no rate of interest payable thereon; erroneously allowed Appellee an attorney fee contrary to law and despite the trial Court again found Appellee had committed "a lot of irregularities" (PR 462); erroneously credited upon Appellee's claimed taxes at its claimed valuations the $719.94 allowed as costs to Appellants in this Honorable Court's Mandate of August 19, 1953 (PR 335-337); and applied, contrary to Appellants'

instructions when paying them, Appellants' payments of $1751.75 on December 10, 1949, in such manner as to satisfy Appellee's claimed taxes at its claimed values of personal property and to leave unsatisfied Appellee's claimed taxes at its claimed value of Appellant Yakutat & Southern Railway's realty, which payments were received, collected, retained and not refunded by Appellee.

ARGUMENT.

FIRST PROPOSITION.

APPELLANTS WERE NOT GIVEN A FAIR, IMPARTIAL HEARING OR TRIAL OR ACCORDED DUE PROCESS OF LAW OR FAIR OPPORTUNITY TO PRESENT THEIR OBJECTIONS AND ADDUCE THEIR EVIDENCE AT EITHER THE JANUARY 12, 1952, TRIAL OR THE JUNE 24, 1954, TRIAL (Points 1, 2, 6, 9, 10, 11, PR 475-478).

Appellants adopt their argument in the first Appeal on the First Proposition (Bf. 13,455, pp. 51-63) all of which they submit necessarily affected the outcome of the hearing on June 24, 1954, and resultant "Order of Sale" (PR 388-389) of June 29, 1954.

Hearing of June 24, 1954.

Relying upon the trial Court's minute order of June 12, 1953 (PR 365), made in Anchorage, that Appellants, if Appellee did not present a new duplicate delinquent tax roll, could renew without prejudice their several motions against a new trial (PR 351-353) and their Objections against taking (PR 343-344) and to suppress (PR 355-356) Dorothy Henry's

deposition (PR 345-350) with its documentary evidence, and their Objections to Appellee's Motion to strike portions of the printed Appeal Record in No. 13,455 (PR 357-359), Appellants, in the absence of service of notice of or application for, or presentation of, a new duplicate delinquent tax roll, could not foresee the necessity of obtaining any further evidence for the hearing on June 24, 1954, even should the trial Court hold it, because the minute order of June 12, 1954 (PR 365), clearly indicated that unless Appellee presented a new duplicate delinquent tax roll no such further hearing would be held; in fact, the Court in its Opinion (PR 382) of June 25, 1954, said that it had "expressed the opinion that the roll found deficient in the respect pointed out by" this Honorable Court "could not be amended and that a new proceeding would have to be initiated, . . ." Nor did Appellee ever serve or present a new duplicate delinquent tax roll other than the pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370), and it was not served until June 23, 1954, too late for Appellants to obtain any new evidence even had that pretended Amended Supplemental Delinquent Tax Roll for 1949 been, which it was not, made up, noticed, original filed with City Clerk, applied for, and presented as required by Sections 16-1-122 and 123, ACLA 1949, and by Section 17, Appellee's Ordinance No. 1 (PR 98-100). In the entire proceedings the only application is that of January 3, 1951 (PR 1-2) and the only notice that of August 10, 1951 (PR 9-11; 12-14), used in presenting the Supplemental

Duplicate Delinquent Tax Roll (PR 10, 13) which was held invalid in this Honorable Court's Opinion (206 F2d 612) on July 8, 1953.

Furthermore, Appellants submit they had a right to rely upon Appellee's irregularities and failure to comply with the statute which they had repeatedly called to the trial Court's attention in the proceedings both prior and subsequent to their first appeal, of which irregularities the trial Court must have known inasmuch as it said in its Opinion (PR 383) filed June 25, 1954, "* * *, even though the procedure now adopted by the City may be somewhat irregular" and in open Court on July 28, 1954 (PR 462), "I know there have been a lot of irregularities here", having previously, prior to the first appeal, in its Minute Order of April 26, 1952 (PR 30), said "No attorney fee was allowed because of irregularities on the part of Yakutat of the kind that encourage litigation".

Appellants stated their need for further time to adduce evidence in open Court on June 24, 1954 (PR 436) and an opportunity to make defense to the pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370) in their Objections (PR 384) of June 28, 1954, to entry of the Order of Sale of June 29, 1954.

Appellants submit that the Order of Sale (PR 50-51) of April 25, 1952, and the Order of Sale (PR 388-389) of June 29, 1954, were each entered without due process of law, which Daniel Webster defined as:

> "A law which hears before it condemns; which proceeds upon inquiry, and renders judgment only

> upon trial. The meaning is that every citizen shall hold his life, liberty, property and immunities, under the protection of the general rules which govern society."
>
> *Ex parte Wall,* 107 US 265, 27 L. ed. 552, 562.

Appellants submit that they hold their property under the protection of the law prescribing the necessary statutory procedure in these proceedings, and that they have been deprived of that protection and were thereby condemned without hearing, and that the trial Court did not proceed upon inquiry, but rendered judgment without such a trial as the protection of the statutory procedure should have afforded them. The Court in open Court warned Appellant's counsel: "Well, of course, I can't see why you do it, because no matter how many times you win, you are eventually going to be defeated." Mr. Robertson: "I don't think so, your Honor." The Court: "Well, you certainly are." Mr. Robertson: "I think your Honor made a serious error there" (PR 462).

Appellants don't think they merited the Court's comment: "The only purpose that the objectors (Appellants) could now have in urging that the City be required to retrace its steps is to further delay and impede the City in its effort to collect these taxes" (PR 382-383).

They contend that they paid in full their respective personal and real property taxes for 1949 on December 10, 1949, at the true and full value thereof, and are now rightfully and legally seeking to prevent Appellant Yakutat & Southern Railway's real property

from being unlawfully sold for claimed taxes which were not assessed or levied according to law and which constitute over-valuations and over-assessments.

SECOND PROPOSITION.

THE TRIAL COURT WAS WITHOUT JURISDICTION BECAUSE OF APPELLEE'S NONPERFORMANCE OF THE STATUTORY AND MUNICIPAL ORDINANCE REQUIREMENTS IN RESPECT TO BOTH THE SUPPLEMENTAL DUPLICATE DELINQUENT TAX ROLL (PR 10, 13), WHICH THIS COURT HELD INVALID IN ITS OPINION OF JULY 8, 1953 (206 F2d 612), AND THE PRETENDED AMENDED SUPPLEMENTAL TAX ROLL FOR 1949 (PR 369-370), ALSO, IN RESPECT TO THE DOCUMENT (PR 347), ADDUCED IN HENRY'S DEPOSITION (PR 345-350) (Points 1, 2, 3, 4, 5, 7, 8, 12, 13, 14, 16, 19, 20, 22, 23, 24, PR 475-481).

Appellants supplement their Second Proposition herein by their Second Proposition on the first Appeal (Bf. 13,455, p. 64) and their argument herein by their argument on the first Appeal (Bf. 13,455, pp. 64-68). It and the decisions therein cited apply with equal, if not greater, force not only to the pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370) as to the Supplemental Duplicate Delinquent Tax Roll (PR 10, 13), which this Honorable Court held invalid in its Opinion of July 8, 1953 (206 F2d 612), but also to the Order of Sale (PR 388-389) of June 29, 1954, as to the Order of Sale (PR 50-51) of April 25, 1952, which this Court reversed (PR 336).

Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370).

This pretended Delinquent Tax Roll for 1949, upon which the trial Court based its Memorandum Decision (PR 382-383), filed June 25, 1954, and its Order of Sale (PR 388-389) of June 29, 1954, upon its face shows that it was made up by Appellee's attorney William L. Paul, Jr., not by the City Clerk as prescribed by Section 17, Appellee's Municipal Tax Ordinance (PR 98). It contains no certificate under the hand of the city clerk and Appellee's corporate seal that it is a true and correct roll or list of the delinquent taxes as required by Sec. 16-1-122 ACLA 1949 (Bf. 13,455, p. 7) and by Sec. 17, supra (PR 98). No proof was made that its original was filed with the City Clerk or that it had been completed and was open to inspection and would be presented to the District Court or that notice to that effect had been published in any newspaper as required by Sec. 16-1-122, ACLA 1949 (Bf. 13,455, p. 8) and by Section 17, supra (PR 99). No proof was made that Attorney Paul or the City Assessor, or other municipal officer, had been designated by either Ordinance or Resolution to make it up as required by Sec. 16-1-122, ACLA 1949 (Bf. 13,455, p. 7). No proof was made of notice of its posting or publication for 30 days as required by Sec. 16-1-122, ibid (PR 8-9) or for four weeks as required by Sec. 17, Municipal Ordinance (PR 99). It couldn't have been posted or published for either 30 days or four weeks because it was made on June 23, 1954 (PR 369-370), the day before the trial Court held a hear-

ing on it on June 24, 1954 (PR 434-435). Furthermore, posting would have been invalid because no proof was made that Appellee had changed its Ordinance (PR 99) to authorize posting instead of publishing.

Appellants' Motion to Strike (PR 379-391) called the trial Court's attention to these statutory defects in the pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370); and, again, in their Objections to Order of Sale (PR 384-387), and, again, in their Motion for New Trial (PR 390-394).

Appellee's counsel in open Court (PR 460) admitted the correctness of the facts in Appellants' Motion to Strike (PR 379-381), but not any legal conclusions or the validity of the objections.

It purportedly valued real property alone at $193,-695.00 and claimed delinquent taxes of $1,988.29 on real property alone, whereas the Supplemental Duplicate Delinquent Tax Roll (PR 10, 13), which this Honorable Court held invalid in its Opinion of July 8, 1953 (206 F2d 612), claimed delinquent taxes of $1,909.38 on real and personal property together, and whereas the document (PR 347), adduced by Appellee's witness Henry's deposition (PR 345-350), under a column headed "Board", shows "11,000" on the same line as "Land" and "176,625" on the same line as "Improvements" or a total of "187,625", not "$193,-695.00". Section 20, Municipal Ordinance (PR 101), defines real property as including not only the land itself but also all buildings, structures, improvements, fixtures, possessory rights, and privileges, and tract as

the land itself, together with fixtures and improvements thereon.

That document, which witness Henry said "is a true copy of the assessment rolls" (PR 346), does not show, nor was any evidence adduced, that the assessor made the affidavit required by Sec. 4, Municipal Ordinance (PR 87), or that he took the oath required of all city officers by Sec. 16-1-54 (Bf. 13,455 p. 20). In fact, the "11,000" and "176,625", above mentioned, as well as the figure "94,000" are in the column headed "Board", not in the column headed "Assessors", plainly indicating that if any assessment was made, which Appellants deny, it was made by the Board of Trustees not by the Assessor, although Sections 2, 3, 4, and 5, Municipal Ordinance (PR 85-88), required the annual appointment of an assessor and that he make the assessment.

The Order of Sale (PR 388-389) of June 29, 1954, held that Appellants were delinquent for real property taxes of $1,988.29.

The pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370) claims a penalty of $198.83 and claims 1% interest monthly for 54 months on $2,187.12 ($1,988.29 + $198.83), amounting to $1,181.04.

Sec. 16-1-112, ACLA 1949 (Bf. 13,455, p. 5) authorizes the imposition of a penalty of not to exceed 15% upon delinquent taxes, and of interest of not to exceed 12% per annum upon delinquent taxes and penalties. However, Sec. 12, Municipal Ordinance (PR 94)

ambiguously provides "On all delinquent taxes a penalty shall be added, which shall be a sum equal to interest at the rate of 12% per annum from the date of such delinquency". It contains no provision for interest upon either delinquent taxes or penalty. At the most it provides for a penalty; but Sec. 16-1-122, supra, does not authorize a penalty computed at an annual rate, but only a flat penalty of not to exceed 15% upon the taxes.

The Order of Sale (PR 388-389) allowed delinquent real property taxes of $1,988.29, plus penalty of 12% thereon, plus interest on such delinquent taxes at the rate of 1% monthly.

An ambiguity in a tax ordinance is construed strictly against the taxing body, and resolved in favor of the taxpayer.

Gould v. Gould, 245 US 151, 153.
B. F. Goodrich v. Peck, 101 OhSt 202.
U.S. v. Merriam, 263 US 179, 187-188.

The Municipal Ordinances (PR 85-102) failing to provide for interest on delinquent taxes or on penalty, Appellants submit that the Order of Sale (PR 388-389) could not allow interest thereon.

No notice of application or application for order of sale, required by Sec. 16-1-123, ACLA 1949 (Bf. 13,455 p. 9), was served or filed other than the Application and Notices (PR 1-14) before this Honorable Court on the first appeal.

The trial Court conceded Appellee's procedure was "somewhat irregular" (PR 383); also, that he knew

"there have been a lot of irregularities" (PR 462); also, in connection with the Order of Sale (PR 50-51) of April 25, 1952, "No attorney fee was allowed because of irregularities on the part of Yakutat of the kind to encourage litigation" (PR 30).

Nevertheless, in its Memorandum Decision (PR 383), filed June 25, 1954, it held in effect that no substantial rights of Appellants had been affected.

Appellants submit that all the authorities, cited to this Honorable Court on the first Appeal (Bf. 13,455, pp. 65-78), support their contention that these irregularities and failure to comply with the provisions of Sections 16-1-122 and 123, ACLA 1949 (Bf. 13,455, pp. 7-10), and of Appellee's Ordinance (PR 98-102) have affected, even lost, their substantial rights.

The U. S. Supreme Court, in a suit wherein a tax title was in controversy, said of the following irregularities

1. No valid assessment for the year in question
   a. Because the assessor did not take and subscribe the statutory oath or affirmation.
   b. Such oath not endorsed upon the assessment books prior to their delivery to the assessor, as required by statute.
2. Failure to publish notice.
3. Failure of the Clerk to certify at the foot of the list of delinquent taxes, the name of the newspaper said list was published in, the date of publication, and the length of time.

4. Failure of the Clerk to attend the sale and make a record in a substantial book, etc.
5. Failure of the Clerk to take the property off the tax roll for the reason that it had been struck off by the state.
6. Failure of the Clerk to deliver to the Collector the tax book, with his warrant attached, thus authorizing the Collector to collect the taxes.
7. Failure of the collector to post notices (printed) of his attendance at certain places to receive the taxes, etc.
8. Failure of the collector to furnish a list to the Clerk of all such taxes that he had been unable to collect, for the purpose of striking from the tax list any exempt property.

"In the present case, it is contended by the appellant that the irregularities alleged by the appellee were cut off under Section 5791 (Statute of Limitations), because they commenced no suit within two years from the date of the sale. But those irregularities deprived the appellees of a substantial right, and were not technical objections to the sale, and were prejudicial to the appellees."

Martin v. Barbour, 140 US 634, 643.

These irregularities before the U.S. Supreme Court are similar to, in fact, some of them are identical with, those committed by Appellee in respect to both

the Supplemental Duplicate Delinquent Tax Roll (PR 10, 13) and the pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370).

As stated by the U.S. District Court, W. D. Arkansas, wherein one of the irregularities was the County Clerk's failure to attach his warrant to the tax books delivered to the Collector,

> "The provisions of the law made for the protection and benefit of the taxpayer are mandatory."
>
> *Conn v. Little, et al.,* 101 F Supp 683, 684.

Appellants submit that the provisions of Sections 16-1-122 and 123, ACLA 1949 (Bf. 13,455, pp. 7-10) as well as Sections 17 and 18, Municipal Ordinance (PR 98-100), are for the benefit of the taxpayer, and that their performance is jurisdictional.

The publication of the notice of sale only once instead of three times as prescribed by Ordinance, was held a fatal defect in the proceedings:

McCaslin v. Hamlin, 223 P2d 326, 327, 328,

so here the failure to perform the statutory and municipal ordinance requirements not only affected Appellants' substantial rights and is a fatal defect in these proceedings; but, as said by Judge Jennings, the trial Court had no jurisdiction until its action had been invoked in accordance with Sections 16-1-122 and 123 (Bf. 13,455, pp. 7-10).

> In re Delinquent Tax Roll, 4 Alaska 721, 723, 726 (Bf. 13,455, pp. 65-66).

Moreover, Section 16-1-65, ACLA 1949 (Bf. 13,455, p. 20) mandatorily requires:

> "The assessor shall once each year, at such time as the council may direct, duly list and assess all the taxable property of the city at its just and fair value."

That statute was made applicable to Appellee by Section 16-2-5, ibid (Bf. 13,455, pp. 2-3). Congress changed the words "just and fair" to "true and full value" on June 3, 1948.

Sec. 48-1-1, ibid (Bf. 13,455, pp. 21-22).

Sections 2, 3, and 4, Municipal Ordinances (PR 83-88), likewise require the assessor to make an annual listing and assessment.

Appellants submit the record contains no evidence of the assessor having listed and assessed their property at its true, and full, or any, value for the tax year 1949; in fact, the document (PR 347), adduced by Henry's deposition (PR 345-350), by placing "11,000", "176,625", and "94,000" in the column headed "Board", not under "assessors", shows that the assessment, if any, which Appellants deny, was made by the "Board" not by the "Assessor" notwithstanding the provisions of Sections 2, 3, and 4, Municipal Ordinance (PR 85-88). Therefore, the pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370) is not even prima facie evidence of the regularity and legality of the assessment and levy of the tax under Sec. 16-1-124 (Bf. 13,455, p. 11).

THIRD PROPOSITION.

THE ORDER OF SALE OF JUNE 29, 1954, AS DID THE ORDER OF SALE OF APRIL 25, 1952, DISREGARDS UNCONTRADICTED, UNIMPEACHED, COMPETENT EVIDENCE AND ITS WEIGHT AND CREDIBILITY, AND IS BASED UPON AN EX PARTE AFFIDAVIT AND OTHER INCOMPETENT EVIDENCE, AND IGNORES APPELLEE'S FAILURE TO PROVE THE LISTING AND ASSESSING FOR THE TAX YEAR COMMENCING JUNE 1, 1949, AT THEIR TRUE AND FULL VALUE EITHER THE REALTY OR THE PERSONALTY OF APPELLANTS (Points 1, 2, 3, 9, 10, 11, 12, 13, 18, 19, 22, 23, 24).

Appellants adopt their argument (Bf. 13,455, pp. 78-86) in support of their Third Proposition, which pertains to their points 1, 2, 3, 9, 10, 11, 12, 13, 18, 19, 22, 23 and 24 (PR 475-481), on the First Appeal and it and the decisions therein cited apply with equal, if not greater, force to the Order of Sale (PR 388-389) of June 29, 1954, as to the Order of Sale (PR 50-51) of April 25, 1952, which this Honorable Court reversed by its opinion of July 8, 1953 (206 F2d 612) and its Mandate (PR 335-337) of August 19, 1953.

Order of Sale of June 29, 1954 (PR 388-389).

This Order of Sale (PR 388-389) was based, according to the trial Court's Memorandum Decision (PR 382) and the Order (PR 388), upon the pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370), whose invalidity Appellants discussed (pp. 18-26, supra).

The only additional evidence, not before the trial Court at the hearing on January 18, 1952 (PR 28), and not before this Honorable Court on the First Appeal in Its Case No. 13,455 wherein it reversed the

Order of Sale (PR 50-51) of April 25, 1952, adduced in support of this pretended Tax Roll was Henry's evidence, testamentary and documentary, by deposition (PR 345-350).

Appellants discuss the incompetency and inadmissibility of this evidence under their Fourth Proposition (pp. 36-45, infra), so will not do so now.

The trial Court admitted and considered it over Appellants' Objections (PR 343-344) to its taking, which Appellee did without awaiting the trial Court's ruling on those Objections, and Appellants' Motion to Suppress it (PR 355-356), which Objections and Motion were presented to the trial Court in Anchorage (PR 364-365) and were renewed by Appellants' Renewal, thereof, dated June 23, 1954, (PR 371-379) in open Court on June 24, 1954 (Minute Order, PR 405; also, 423, 441, 442, 447).

The trial Court's minute order of June 12, 1954 (PR 365) authorized such renewal without prejudice if Appellee failed to present a new duplicate delinquent tax roll on or before June 24, 1954. Appellee failed to present any new duplicate delinquent tax roll, and did not serve the pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370) until mid-afternoon June 23, 1954 (PR 370; 379), whereas the new trial was held the next morning.

Appellants cited in their Renewal of those Objections and Motion numerous authorities (PR 375-378) showing the incompetency and inadmissibility of Henry's deposition (PR 345-350), which they again

cite (pp. 41-45, infra), and which are equally applicable to the pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370), although Appellants did not so state (PR 374) in their Renewal (PR 371-379) because that pretended Roll was not served upon them until after their counsel had written that Renewal (PR 379).

The evidence (Bf. 13,455, pp. 36-48; 51-59; 79-83) before the trial Court on January 18, 1952, and before this Honorable Court on the First Appeal in its Case No. 13,455 no more proved the validity of the pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370) than it did the validity of the Supplemental Duplicate Delinquent Tax Roll (PR 10, 13).

The trial Court's Order of Sale (PR 388-389) of June 29, 1954, was necessarily based upon Henry's deposition (PR 345-350) with its incompetent and inadmissible evidence because, as stated, no other additional evidence was before it on June 24, 1954, in support of this proceeding.

Without additional evidence, the trial Court's Order of Sale (PR 388-389) of June 29, 1954, would have been directly contrary to this Honorable Court's Opinion of July 8, 1953, (206 F2d 612) and its Mandate (PR 335-337) of August 19, 1953.

Witness Henry's deposition, with document (PR 345-350), which was incompetent and inadmissible as stated in Appellants' Fourth Proposition (infra), did not prove the assessor, as required by Sec-

tion 16-1-65, ACLA 1949 (Bf. 13,455, p. 20), and by Sections 2, 3, and 4, Municipal Ordinance (PR 85-88), had listed and assessed Appellants' property for the tax year 1949 at its true and full value. If it had been competent, at the most it showed that the Board, not the Assessor, had for 1949, under the column headed "Board", not under the column headed "Assessor's", inserted on the line opposite "Land" the figures "11,000", opposite "Improvements" the figures "176,625", and opposite "Personal" the figures "94,000." (PR 347). "11,000" plus "176,625" total "187,625", not $193,695.00 as stated in the pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370).

These differences are not small, but even if they were that would not validate them.

> "The excessive levy is in fact small and trifling, . . . 'The smallness of the amount of the excess over the amount due does not, in a tax sale, affect the question, as the maxim, De minimis non curat lex, does not apply to tax sales. The provisions of the law made for the protection and benefit of the taxpayer are mandatory' . . .
>
> "In McCulloch v. Maryland, 4 Wheat. 316, 17 US 316, 429, 4 L.ed. 579, Chief Justice Marshall stated, 'that the power to tax involves the power to destroy.' This principle is pertinent when there is no power to tax or when the amount of the tax is not authorized. The right to extend a tax levy is dependent upon the authority to extend the specific tax at the legal and authorized rate."
>
> *Conn v. Little, et al.,* 101 F Supp 683, 684, 685.

There was no other evidence, competent or incompetent, of any kind in support of that Pretended Tax Roll (PR 369-370) to prove that Appellants' separate property had been separately listed and assessed as to either personalty and realty, adduced at the hearing on June 24, 1954.

This Honorable Court in its Opinion of July 8, 1953, (206 F2d 612, 616) held:

> "Since there is nothing in the record" (Volume I, PR herein) "to indicate, and no basis for a presumption that realty was properly assessed, or, if properly assessed, that any specific amount of taxes thereon is unpaid, the City has made no case against appellants. No part of the order can stand."

Appellee is now seeking to supply (PR 440-441) that deficiency through the incompetent and inadmissible evidence of Henry's deposition (PR 345-350), particularly by the document (PR 347). In its petition for rehearing (p. 8) in this Court's case No. 13,455 Appellee asserted that "the record is replete with evidence from which the Court could make findings;" and referred this Court to pages 117-126, 131, 134, 137, 147-149, 152-155, 162, of what is now Volume I, PR. This Court denied that petition for rehearing. Information of the same kind in almost the same form but for 1948, whose claimed taxes the trial Court disallowed, appears at PR 148 and, in narrative form, at PR 125 for 1949, which Appellee then claimed as it now claims the incompetent, inadmissible document (PR 347) supplies the deficiency in the record (PR

440-441), which document is *not new evidence* as it shows on its face that it was in existence and in Appellee's possession at the time of the first trial on January 18, 1952, it purportedly originating in 1948. If it ever were competent and admissible, which Appellants contend it was not, Appellee should have adduced it at the first trial. Appellee obtained a new trial and the Order of Sale (PR 388-389) of June 29, 1952, not upon new evidence, but upon evidence which it withheld from adducing at the first trial. It was not newly discovered evidence, as required by Rule 59, FR Civ. P., nor does it come within Rule 60, ibid, assuming but not conceding a new trial could be granted.

The trial Court's statement in his Memorandum Decision that, "evidence in support of the objection that the properties have been overvalued is not admissible here because it was not presented to the Board of Equalization" (PR 383), entirely ignores the lack of any listing and assessing by the assessor of Appellants' properties for the tax year 1949 as required by Section 3, Municipal Ordinance (PR 86), and by Sec. 16-1-122, ACLA 1949 (Bf. 13,455, p. 7); hence, that the entire proceeding is void from the beginning and that Appellants had no obligation to comply, assuming without conceding its validity, with Sec. 7, Municipal Ordinance (PR 89-90).

Appellants in the sixth defense in Cause No. 6302-A (PR 112) specifically charged that the 1949 assessment was not made by the assessor, also therein and in the fourth defense (PR 111) that the taxes were

not levied in accordance with Sections 1, 2, and 3, Municipal Ordinance (PR 85-86).

Appellants in their Objection No. 12 (PR 21) of September 25, 1951, specifically charged that the assessment was made by one Toner who was not the city assessor, which was served upon Appellee on October 9, 1951 (PR 22).

Appellants in their trial Brief of February 11, 1952, requested time to adduce evidence to prove that no assessment was made for 1949 and that the purported assessment was illegal (PR 33).

Appellants in their Proposed Findings and Conclusions of March 22, 1952, after the hearing of January 18, 1952, requested Findings 2, 3, 4, and 5 (PR 42-43), to the effect no person took the oath or qualified as assessor, no assessment was made by Appellee, Toner was never appointed or qualified as assessor, the Board of Trustees made no assessment, for the tax year 1949, also Requested Finding 14 (PR 44) that the Municipal Ordinance (PR 85-86) required the assessment to be made by an assessor.

Toner testified that he took no oath as assessor and that he didn't think he was appointed assessor (PR 190), also that he appraised the property in January or February, 1950 (PR 190), which was six weeks or more subsequent to Appellants' counsel paying their taxes of $1751.75 for 1949 (PR 143-145) and to the entry of "Dec. 12, 1949, $1751.75" on the Document (PR 347) under the Columns headed "Date Payment" on the line opposite "Land".

All those matters, except the Document (PR 347), were before the trial Court entered its Order of Sale (PR 80) of April 25, 1952, and all, except the Document (PR 347) and Appellants' Requested Findings and Conclusions (PR 42-49), were before the trial Court before it filed its Opinion (PR 38-41) of March 6, 1952.

All of those matters, except the document (PR 347), were before this Honorable Court before it rendered its Opinion of July 8, 1953, 206 F2d 612. (Bf. 13,455, pp. 29-36, also 42-44).

The record contains no evidence of the appointment of an assessor, his taking an oath of office, or his listing or assessing Appellants' properties for 1949; in fact, on Appellee's document (PR 347), in the section headed "1949", under the Column headed "Board", not "Assessors", "11,000" appears on the line opposite "Land", "176,625" on the line opposite "Improvements", and "94,000" on the line opposite "Personal."

The trial Court's Memorandum decision (PR 382-383) thus holds, though Appellee failed to perform the jurisdictional requirements of Sec. 3, Municipal Ordinance (PR 86-87) and of Sec. 16-1-112, ACLA 1949 (Bf. 13,455, pp. 4-5), to make an annual listing and assessment, that, if Appellants failed to strictly comply with Sec. 7, Municipal Ordinance (PR 89-90), they are without right to challenge the invalidity of the pretended assessment.

Appellants submit that this puts the cart before the horse, and that they need pay no attention to an

assessment which is not made in accordance with statutory and municipal requirements.

They contend that Sec. 7, Municipal Ordinance (PR 89-90) is not authorized by Sec. 16-1-112, ACLA 1949 (Bf. 13,455, pp. 4-5), nor that non-compliance therewith limits the trial Court's jurisdiction under Sec. 16-1-124, ACLA 1949 (Bf. 13,455, pp. 10-12), to hear and determine, according to equitable principles, whether any tract was over-valued or over-assessed or whether the Board of Trustees had acted in bad faith.

Appellee is a public corporation, a political subdivision of the Territory. It has only such legislative powers as the Territory delegates to it. It is not an administrative body.

Appellee's claimed new legal issue that Appellants "did not exhaust their administrative remedy" (PR 449), which it waived by not presenting at the January 12, 1952, hearing, does not apply to a legislative body.

Appellants submit that, if the rule re exhaustion of administrative remedies applied, which they don't concede, the trial Court abused its discretion in holding upon the same facts between the same parties that Appellants have no right to challenge the validity of the claimed taxes because of that rule when Appellee failed to make the assessment in the manner provided by statute and ordinance.

The application of that rule is a matter of judicial discretion.

"Whether it should have denied relief until all possible administrative remedies was a matter which called for the exercise of its judicial discretion."

U.S. v. Abilene, etc., Co., 265 US 274, 282.

FOURTH PROPOSITION.

APPELLEE'S WITNESS HENRY'S TESTIMONY, WITH ITS DOCUMENTARY EVIDENCE (PR 345-350), WAS INCOMPETENT AND INADMISSIBLE TO EXTRINSICALLY EITHER IMPEACH OR SHOW FACTS NOT DISCLOSED BY EITHER THE SUPPLEMENTAL DUPLICATE DELINQUENT TAX ROLL (PR 10, 13) WHICH THIS HONORABLE COURT HELD WAS INVALID IN ITS OPINION OF JULY 8, 1953 (206 F2d 612), OR THE PRETENDED AMENDED SUPPLEMENTAL DELINQUENT TAX ROLL FOR 1949 (PR 369-370) (Points 23, 24, PR 481).

The trial Court based its Memorandum Decision (PR 382-383), filed June 25, 1954, and its Order of Sale (PR 388-389) of June 29, 1954, upon the pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370).

Appellants submit that Henry's testimony, with its documentary evidence (PR 345-350), was incompetent and inadmissible to support either Appellee's pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370) or the Supplemental Duplicate Delinquent Tax Roll (PR 10, 13) which this Honorable Court held was defective in its Opinion of July 8, 1953 (206 F2d 612), in its Case No. 13,455. In open Court on June 24, 1954, Appellee took the position that it cured the latter (PR 440-441).

As previously stated this was the only additional Evidence at the trial on June 24, 1954, adduced in support of this proceeding (p. 8, supra).

Appellants directed the trial Court's attention to its incompetency and admissibility nine times: (1) Objections (PR 343-344) to its taking; (2) Motion to Suppress it (PR 355-356); oral argument in Anchorage on June 11, 1954 (PR 364; 423); (3) Objections to Appellee's Motion to Strike (PR 357-359, at 357); (4) Renewal of Motions and Objections (PR 371-379) citing decisions upon this very point (PR 374-379); (5) Motion to Strike (PR 379-381, at 381) pretended Amended Supplemental Tax Roll for 1949 (PR 369-370); (6) In open Court on June 24, 1954 (PR 435, 436, 441, 442, 447; (7) Objections to Order of Sale (PR 384, 385, 386); (8) In open Court on June 29, 1954 (PR 453); and (9) Motion for New Trial (PR 390-394; at 391, 392).

Appellee risked taking Henry's deposition on May 24, 1954 (PR 345-350), without awaiting the trial Court's ruling on Appellants' Objections (PR 355-356) to its taking.

The document (PR 347) is not new or newly discovered evidence. It purports to show on its face that its making was commenced in 1948. It is a purported City document (PR 346). It must have been in Appellee's possession at the first trial on January 18, 1952, but Appellee withheld it from the Court's knowledge and did not offer it in support of the Supplemental Duplicate Delinquent Tax Roll (PR 10, 13),

because Appellee's counsel swore in Appellee's Response (PR 367-368) to Appellants' Demand for Production of Documents (PR 365-366): "This is a partial new trial and no evidence than is already in the official in either cause is to be adduced than what the *parties* could have had many months ago" (PR 368) (emphasis supplied), notwithstanding Appellants' Motion of February 11, 1952 (PR 32-33), that all of the municipal records be brought into at Appellants' expense and examined by the trial Court before it finally considered this proceeding.

The duplicate delinquent tax roll which is presented to the Court is the primary record. After the hearing, the original is to be corrected from the duplicate, not the duplicate from the original. (Sec. 16-1-126, ACLA 1949; Bf. 14,355, p. 12). No evidence was offered of the existence of an original or the filing thereof with the City Clerk of the pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370) as required by Section 16-1-122, ibid, Bf. 14,355, p. 8) and by Section 17, Municipal Ordinance (PR 99).

No Statutory Authority Exists to Amend, Enlarge, or Impeach by Extrinsic, Aliunde, or Other Evidence a Duplicate Delinquent Tax Roll Presented to the Court, or to Present a New Duplicate Delinquent Tax Roll.

The common definition of an assessment or tax roll or list is:

> "While it seems that a paper or warrant containing a tax against a single place only may be

regarded as a 'tax list' within the meaning of certain statutes, an assessment or tax roll or list appears ordinarily to be a completed record for the year of all the taxable persons and property within the tax district, so arranged and itemized as to show to each taxpayer who may examine it exactly what property he is assessed on and the amount of tax he is required to pay thereon, although it may perform other functions."

84 CJS 888, Sec. 454.

"An assessment list or roll can be made with proper legal effect only by the particular board or officer designated by statute."

Ibid, p. 888, Sec. 455.

Appellants submit no distinction exists between adding omitted property to a delinquent tax roll than to offer evidence to show that real and personal property taxes, instead of being lumped, were assessed separately and segregated.

An assessor may not add omitted property to the assessment roll unless authorized by statute.

Ibid, p. 957, Sec. 508.

The duplicate delinquent tax roll (PR 10, 13) shows that both real and personal property were assessed, but that they were not segregated or separately assessed; hence, this Honorable Court set aside the trial Court's Order of Sale of April 25, 1952. Appellee claimed (PR 440-441) that deficiency in the record was supplied by Henry's deposition (PR 345-350), and that no amended delinquent tax roll was neces-

sary (PR 440) but nevertheless presented and the trial Court based its Memorandum Decision (PR 382-383), filed June 25, 1954, and its Order of Sale (PR 388-389) of June 29, 1954, upon the pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370), notwithstanding Henry's documentary evidence (PR 347) did not support that pretended Tax Roll which shows real property alone valued and assessed at $193,695.00 and delinquent taxes of $1,-988.29, but shows, as stated, under the column head "Board", not under the column headed "Assessor's", on the line opposite "Land" the figures "11,000", and on the line opposite "Improvements" the figures "176,625.00" which total "187,625" not $193,695.00, regardless of the Supplemental Duplicate Delinquent Tax Roll (PR 10, 13) showing combined delinquent realty and personalty taxes of $1909.38. The Order of Sale (PR 388-389) of June 29, 1954, took the figure $1,988.29 from the pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370) so must have ignored the claimed figures of "187,625.00" in the document (PR 347).

No other evidence was adduced in support of the pretended Tax Roll (PR 369-370).

Regardless of whether Appellee claims Henry's deposition, testamentary and documentary (PR 345-350), supports the Supplemental Duplicate Delinquent Tax Roll (PR 10, 13), or the pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370), it is not competent or admissible evidence.

The rule is in order to sustain an addition of property by tax assessors as omitted, it must appear that the items added were not assessed in the original assessment.

Ibid, p. 959, Sec. 508.

Even where reviewing boards or officers are authorized by statute to make corrections in the assessment roll, they must do so strictly in accordance with the statutory provisions.

Ibid, p. 998, Sec. 520.

Here there is no statutory authority for any one to make any corrections in the duplicate delinquent tax roll.

This same principle is also laid down in

Ibid, p. 1002, Sec. 521.

and in

Ibid, p. 1006, Sec. 522.

Section 16-1-122, ACLA 1949, specifically provides what shall be contained in the delinquent tax roll, viz.:

> "Such roll shall show therein the property assessed, the amount of the tax due, penalty and interest, separately stated on each tract assessed, to whom each tract is assessed, if assessed as unknown, so stated."

The facts stated in the roll are conclusive. Dorothy Henry's deposition seeks to establish other facts and to impeach the roll.

The Duplicate Delinquent Tax Roll itself is the best evidence.

Ronkendorff v. Taylor, 7 L Ed 882;
84 CJS 758, Taxation, Sec. 395;
Brink v. Dann, 144 NW 734, 736.

The only changes in it that the statute authorizes are payments made during time of publishing or posting and up to time of sale, Sec. 16-1-122, ACLA 1949 (Bf. 13,455, p. 8), which must be endorsed upon both the original and the duplicate, and proportionate share of costs by the Clerk of the District Court on the duplicate. Sec. 16-1-125, ACLA 1949 (Bf. 13,455, p. 12).

"Extrinsic evidence is not admissible to establish facts which can be evidenced only by the assessment roll."

84 CJS, p. 922, Sec. 485.

No statutory authority exists to correct any error in the roll by showing what the Appellee now claims is the correct amount of taxes that should have been assessed against the real property only.

Ibid, Sec. 520, p. 998, supra.

"The necessity, sufficiency, correction, and preparation of duplicate lists or rolls depend" "on statutory provisions."

Ibid, Sec. 842, p. 920.

"Tax records and documents are commonly considered conclusive and not subject to impeachment by parol evidence."

32 CJS, p. 806, Sec. 883.

Affidavit of Service of notice to redeem from tax sale cannot be aided by parol.

Geil v. Babb, 242 NW (Iowa) 34.

Assessment roll. Insufficient description of land on assessment roll cannot be aided by extrinsic evidence, and name listed under heading of "owner" cannot aid description.

Ransom v. Young, 168 So. (Miss.) 473.

Plat book of an assessor cannot be impeached or varied by parol evidence as to the description of land.

Blayden v. Morris, 214 P. (Idaho) 1039.

Record of board of assessors, which is duly kept pursuant to statutory requirement, generally cannot be varied or added to by other evidence.

Carbone, Inc., v. Kelly, 194 N.E. (Mass.) 701.

Records of county commissioners as to whether a tract of land is seated or unseated and has been assessed, taxed, and sold by the treasurer cannot be varied by parol testimony or by the private record of an assessor.

McCall v. Lorimer, Pa. 4 Watts 351.

See also:

Trustees of St. Paul Methodist Episcopal Church South v. District of Columbia, 212 F. 2d 244;

Tumulty v. District of Columbia, 1949 69 App. D.C. 390, 400, 102 F. 2d 254, 264;

Atchison, T. & S. F. Ry. Co. v. Elephant Butte Irr. Dist., 10 Cir. 1940, 110 F. 2d 767, 773;
Cooley, Taxation, Vol. 3 (4th Ed. 1924), 1046.

No evidence was adduced that the assessor, if there was one, which Appellants deny, ever made and subscribed an affidavit to the document (PR 347), if it is construed to be the assessment book, as required by Section 4, Municipal Ordinance (PR 87), or that he annually and for the tax year 1949 listed and assessed the property at its true and full value, as required by Sec. 3, *ibid* (PR 86), and by Sec. 16-1-65, ACLA 1949 (Bf. 13,455, p. 20), or that he took an oath of office as required by Sec. 16-1-54, *ibid* (Bf. 13,455, p. 20), or that he made or prepared the document (PR 347), which upon its face purports to show that the figures thereon are those of the Board, not of the Assessor, because no figures are under the column headed "Assessor's". They are under the column headed "Board", notwithstanding Sec. 3, Municipal Ordinance (PR 86), required the assessor to make the assessments. Therefore, the document (PR 347) is not *prima facie* evidence of any listing, assessment, valuation or levy because on its face, with no proof to the contrary, it shows compliance with neither statute nor ordinance. Similarly, the pretended Amended Supplemental Delinquent Tax Roll is not *prima facie* evidence of any assessment or levy for 1949 (PR 369-370). See, *supra,* p. 36.

People v. San Francisco Savings Union,
31 Cal. 132, 138;

National Distillers, etc. v. Board, etc.,
256 SW 2d 481, 484;
84 CJS 752, Taxation, Section 392.

The facts (PR 379-381), stated in Appellants' Motion to Strike that Pretended Roll, are admittedly correct. Appellee's admission (PR 460). Appellants' Motion to Amend or Alter Minute Order (PR 390) and Motion to Strike (PR 379-381).

> "Presumptions and burden of proof. As in other civil cases, the burden is on the plaintiff to establish a prima facie case and on the defendant to overcome it, and to establish his affirmative defenses. In a suit to enforce a tax lien, the burden is on plaintiff to show that the tax was legally assessed, legally committed to an officer for collection, and that the defendant was the owner or in possession of the land . . ."
>
> Taxation, 85 CJS 83, Section 780.

FIFTH PROPOSITION.

THE TRIAL COURT WAS WITHOUT JURISDICTION TO TRY THIS PROCEEDING DE NOVO, AND THIS HONORABLE COURT'S MANDATE (PR 335-337) OF AUGUST 19, 1953, ISSUED IN CASE NO. 13,455, AND THE TRIAL COURT'S JUDGMENT ON MANDATE (PR 339) ARE RES JUDICATA, AND THIS HONORABLE COURT'S OPINION OF JULY 8, 1953, IS THE LAW OF THE CASE (Points 16, 17).

Appellants brought this point to the trial Court's attention ten times prior to the new trial on June 24, 1954, viz.: in open Court on May 10, 1954 (PR 413-414); in open Court on May 11, 1954 (PR 415-421);

on May 21, 1954, by Objections (PR 343-345) to Appellee's taking witness Henry's deposition; on May 28, 1954, by Motion (PR 355-356) to suppress that deposition, and by Objections (PR 357-358) to Appellee's Motion to strike portions of the printed appeal record in this Honorable Court's Case No. 13,455 (PR 341-342), and by Motion (PR 351-353) to vacate the trial Court's order, entitled "Order Shortening Time" (Sup. PR 350a), setting this proceeding for new trial on June 24, 1954; in open Court to Judge Folta in Anchorage on June 12, 1954 (PR 424-434); on June 23, 1954, by Renewal of all of said Motions and Objections (PR 371-379); on June 24, 1954, by Motion to Strike (PR 380-381) to strike the pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370); and in open Court on June 24, 1954 (PR 435); and three times after the hearing on June 24, 1954, viz.: on June 29, 1954, by Objections (PR 384-387) to the proposed Order of Sale (PR 388-389); on July 2, 1954, by Motion for new trial (PR 390-394; and in open Court on July 28, 1954 (PR 390).

This Honorable Court had before it in Case No. 13,455 all of Volume I, Transcript of Record herein, including the Supplemental Duplicate Delinquent Tax Roll (PR 10, 13), which it held invalid and which was the only Duplicate Delinquent Tax Roll before the trial Court when it set this proceeding for trial in its Order, entitled "Order Shortening Time" (Sup. PR 350a).

This Court in its Opinion (206 F2d 612) characterized this proceeding as a special proceeding; in fact, it is so characterized by the statute itself. Sec. 16-1-122, ACLA 1949 (Bf. 13,455, p. 7). In that Opinion this Court said:

> "If the amount were separately stated in the delinquent tax roll filed by the city with its application for order of sale, it would be presumed that the realty was properly assessed and that the amount stated remains unpaid."
> 206 F2d 612, 616.

The amount has never been stated in any delinquent tax roll other than the pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370), which admittedly was not prepared or presented in accordance with statutory or municipal ordinance requirements (PR 439-440; also 379-381 and 460).

See: Second Proposition, pp. 18-26 supra.

Appellants submit that the principles announced by the United States Supreme Court and this Honorable Court and other Courts in many decisions clearly sustain their contention as to the finality of the "Order of Sale" (PR 50) in denying Appellee's Application for sale to make the 1948 taxes and the finality of this Honorable Court's Mandate, issued on August 13, 1953 (PR 335-337), in denying that Application for sale to make 1949 taxes under Chapters 16-1-121 through 131, ACLA 1949, and that the trial Court had no jurisdiction, after the entry of that Order and of that Mandate, to further try that appli-

cation upon that delinquent tax roll (PR 10, 13) or upon the pretended Amended Supplemental Tax Roll for 1949 (PR 369-370) or to admit and consider any evidence, *aliunde* or otherwise, in support or proof of either of those duplicate delinquent tax rolls.

This Honorable Court's Mandate of August 19, 1953 (PR 335-337), did not send this proceeding back for a further or new trial, but it did contain the command:

> "You, therefore, are hereby commanded that such proceedings be had in said cause, in conformity with the opinion and judgment of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding."

The United States Supreme Court, in construing a mandate containing a similar command in a case in which the Railroad Company contended that no judgment had been entered against it, but only against its former receiver, said:

> "Every point the receiver could have presented was raised on behalf of the company, and disposed of after elaborate argument and careful consideration and the stipulation in that regard was fully complied with. If it had been intended to reserve the present contention, it is enough to say that that intention was not expressed and cannot be inferred, and the matter was determined by our judgment. The Circuit Court properly attempted to exercise no discretion in the premises, but discharged its duty by carrying the mandate into effect according to its terms. This court awarded execution against the company for the

costs here, but it was for the Circuit Court to award execution for the amount of the judgment, as it was directed to do, and as it did, and interest was properly included at the rate which obtained under the law of Texas at the time judgment was rendered, the change in the law in that respect operating only prospectively. Inasmuch as its action conformed to the mandate, and there were no proceedings subsequent thereto not settled by the terms of the mandate itself, the case falls within the rule often heretofore laid down and a second writ of error cannot be maintained. Cook v. Burnley, 11 Wall. 672, 677; Steward v. Salamon, 97 U.S. 361; Humphrey v. Baker, 103 U.S. 736."

Texas & Pacific Ry. v. Anderson, 149 US 239, 241, 242.

The United States Supreme Court in a case where the appeal opinion said:

"The decree will be reversed and the case remanded for further proceedings not inconsistent with this opinion,"

while allowing a replication to be filed in an equity case after the appeal, the case originally having been decided upon the complaint and answer only, said:

"It must be remembered, however, that no question, once considered and decided by this court, can be reëxamined at any subsequent stage of the same case. Clark v. Keith, 106 U.S. 464; Sibbald v. United States, and Texas & Pacific Railway v. Anderson, cited at the beginning of this opinion."

In re Sanford Fork & Tool Company, 160 US 247, 255, 259.

Another United States Supreme Court case, construing similar language of the mandate, is:

Gulf Refining Co., et al. v. U. S., 269 US 125, 135.

The United States Court of Appeals for the Second Circuit in a criminal case where conviction for a six year term was set aside and a three year sentence imposed by the lower Court upon a showing by a defendant after the return of the mandate which contained the command:

> "That such further proceedings be had in said cause, in accordance with the decision of this court, as according to right and justice and the laws of the United States, ought to be had, the said writ notwithstanding,"

said:

> "In the case of Re Sanford Fork & Tool Co., 160 U.S. 247, 255, 40 L.ed. 414, 416, 16 Sup.Ct. Rep. 291, 293, the Supreme Court said: 'The circuit court is bound by the decree as the law of the case, and must carry it into execution, according to the mandate. That court cannot vary it, or examine it for any other purpose than execution, or give any other or further relief, or review it, even for apparent error, upon any matter decided on appeal, or intermeddle with it, further than to settle so much as has been remanded.'
>
> "The above statement of the law is alike applicable to civil and criminal cases, and the fact that the term has been extended is quite immaterial. The judgment which was before this court was

in law disposed of and finally settled by our decision, and is the law of the case beyond the power of the court below, which must carry it into execution according to the mandate. Sibbald v. United States, 12 Pet. 488, 492, 9 L.ed. 1167, 1169, and this principle of law cannot be set aside by the trial court, and its power enlarged, by merely extending the term for a period of years.

"There is a phase of this matter to which reference may be made before bringing this opinion to a conclusion. This court sits to review *final* orders, decrees, and judgments. 'Final judgment,' according to Bouvier, 'is one which puts an end to a suit.' It is used in contradistinction to a judgment which is only intermediate, and does not finally determine or complete the suit, which is known as an interlocutory judgment. In Bishop's New Criminal Procedure, vol. 2, Sec. 1364, that writer, treating of writs of error, lays down the proposition that 'this writ lies only to correct the final judgments of courts of record in their doings, after the course of the common law;' and it is added that if a proceeding has not progressed to final judgment, or if the court is not one of record, the corresponding remedy is certiorari. And again, in Sec. 1366, the same writer says: 'Only a final judgment, disposing of the whole cause, including all the counts, can be reviewed on a writ of error.' "

* * *

"When the lower court proceeds contrary to the mandate of this court, it interferes with this court's jurisdiction as we held in Muir v. Chatfield, 255 Fed. 24, 27." ibid, p. 536.

"And there is no doubt as to the power of this court to issue a writ of mandamus to compel the court below to enforce the judgment according to the mandate."

U. S. v. Howe District Judge, 280 Fed 815, 820, 821;

citing

McClelland v. Garland, 217 US 268, 54 L Ed 762, 766;

Re: Wash. & C. R. Co., 140 US 91, 94, 95, 35 L Ed 673;

U. S. ex rel Mudsill Min. Co. v. Swan, 65 Fed 648; cer. den. 259 US 587, 66 L Ed 1077.

This Honorable Court's opinion of July 8, 1953, 206 F2d 612, contained no charge that the trial Court should reëxamine this proceeding, nor did it anywhere reserve or use any language indicating the intention that further evidence should or could be adduced either in support of or against the duplicate delinquent tax roll and application for sale that were its subject, nor was anything left unsettled by the terms of the mandate itself.

As said by the United States Supreme Court in

Supervisors v. Kennicott, 94 US 498, 499, 24 L Ed 260,

in which the Mandate directed a new trial,

". . . it is proper to inquire what must have been intended by the use of that term in the decree, since it cannot have its ordinary meaning. For that purpose, we held in West v. Brashear,

> 14 Pet. 51, that resort might be had to the opinion delivered at the time of the decree. Availing ourselves of this rule, it is easy to see that there could have been no intention to open the case for further hearing upon the issues presented and decided here. There is not an expression of any kind in the opinion indicating any such determination. On the contrary, it is distinctly declared that the mortgage was valid, and that the complainants were entitled to their judgment."

This Honorable Court's opinion distinctly reversed the order of sale of April 25, 1952, and said that "the amount of taxes, penalty, and interest due upon realty alone is not shown in the record", and was not separately stated in the delinquent tax roll.

Neither in its opinion nor in its mandate did this Honorable Court direct a new or further trial; in fact, its mandate taxed costs of $719.94 against Appellee.

This Honorable Court has repeatedly held that it has jurisdiction to issue writs of mandamus in aid of its appellate jurisdiction.

Shell Oil Co. v. U. S. Dist. Ct., 70 F2d 394 (9CCA);

Whittle v. Roche, 88 F2d 366, 371 (9CCA).

The United States Supreme Court granted mandamus against the lower court's granting or entertaining a petition for a rehearing upon newly discovered evidence.

In re Potts, 166 US 263, 41 L Ed 994.

Neither by its opinion nor by its mandate did this Court command the trial Court to admit or consider any new or additional evidence.

Nor does this Court now have jurisdiction to recall its mandate (PR 335-337) or make any changes therein, inasmuch as the term at which it was entered has expired.

Waskey et al. v. Hammer et al., 179 F 273 (9 CCA);

Miocene Ditch Co. v. Campion M. T. Co., 197 F 497 (9CCA).

Appellee admitted those statutory requirements had not been performed in regard to the pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370). The trial Court asked:

> "Well, your position now is that these steps, that are set forth in the statute that must be taken with reference to the preparation and the presentation of the delinquent tax roll, need not be taken in the case of an amended tax roll? That is the thing I am in doubt about."

Mr. Paul:

> "Yes, I think so, your Honor" (PR 439-440).

Appellee also admitted (PR 460) the correctness of the facts stated in Appellants' Motion (PR 379-381) to strike that pretended Tax Roll. Appellants respectfully call attention to that Motion, including all of the first paragraph thereof and the specifically numbered Objections 1, 2, 3, 4, 5, 6, and 7, therein showing noncompliance with statutory and ordinance

requirements. In Objection 5, Appellants inadvertently said "Clerk of the Court" instead of "Clerk of the City".

Appellee then took the position that the hearing on June 24, 1954, was "a partial new trial" (PR 434; 445) and that it was upon the Supplemental Duplicate Delinquent Tax Roll (PR 10, 13), which this Honorable Court held invalid in its Opinion of July 8, 1953 (206, F2d 612) because its counsel said, referring to this Honorable Court, "It saw the same delinquent tax roll that we are now considering", and the only delinquent tax roll this Honorable Court ever saw, prior to this instant appeal, was the one (PR 10, 13) before it in Case No. 13,455.

Appellee's counsel further said: "I look upon the tender of the amended, supplemental delinquent tax roll that I filed yesterday as being merely an amended complaint for the assistance of the Court in drawing up an order. That is all." (PR 439) and, referring to this Honorable Court, "They didn't even feel that an amended delinquent tax roll was necessary at all", and "Strictly speaking, I don't think that an amended delinquent tax roll is necessary. I only tendered it with the view of assisting the Court in making its computation" (PR 440).

Appellee also said: "At this time we are offering to introduce only evidence of segregation" (PR 435) and "We are supplying what the Court of Appeals couldn't find when it looked over the whole book" (PR 438) and "I am offering now, the evidence of

the City Clerk, consisting of the assessment roll which does show segregation" (PR 439), and "Well, I mean we have supplied the deficiency by taking the deposition of Dorothy Henry" (PR. 440-441).

Appellee did not refute Appellants' counsel's statement made in open Court on June 24, 1954, that its counsel had told him: "He intended to stand at this hearing upon the deposition of Dorothy Henry, that they didn't have any delinquent tax roll" (PR 436).

Notwithstanding that the only additional evidence offered in support of granting an order to sell Appellant Yakutat & Southern Railway's realty was the Henry deposition (PR 345-350), which does not, as noted, give the same figures as the pretended Amended Supplemental Delinquent Tax Roll (PR 369-370), and the admitted nonperformance of statutory and municipal ordinance requirements in regard to both that pretended Tax Roll and the document (PR 347) produced by the Henry deposition, the trial Court based its Memorandum Decision (PR 382-383) and its Order of Sale (PR 388-389) upon that Pretended Tax Roll (PR 369-370).

In its Memorandum Decision (PR 383) the trial Court considered Appellee's claim: "What I am in reality doing is raising a new legal issue. That is what I am doing. The new legal issue is that the objectors did not exhaust their administrative remedy, and, therefore, they have no standing before this Court at all" (PR 449), which if either proper or valid existed at the January 18, 1952, hearing, but which Appellee then did not assert and thereby

waived, and considered the Henry deposition with its document (PR 345-350), which was not newly discovered or new evidence but was in Appellee's possession but not divulged by it at the January 18, 1952, hearing, and was incompetent and inadmissible. (Fourth proposition, supra).

Here the parties are the same; the properties are the same; the tax year is the same; the taxes are the same, except Appellee now claims $1988.29 for realty taxes alone (PR 369) whereas previously it claimed $1909.38 for combined realty and personalty taxes (PR 10, 13); the proceeding is the same as in the first Appeal before this Honorable Court in its case No. 13,455. The only further evidence, which is not new or newly discovered, is Henry's deposition with document (PR 345-350).

In *Harvey Coal Corporation v. U. S.,* Ct. Cl. 35 F Supp. 756, wherein are cited *County of Sac,* 94 US 351, and *Tait v. Western Maryland Ry. Co.,* 289 US 620, the Court said, at p. 762:

> "The two proceedings, involving taxes for different years, are not the same, but the parties are the same and the question presented in this suit was before the Board, it was necessary for its decision; and it was decided by the Board. In such case, it is well settled that the Board's decision is res judicata in this proceeding."

See, also:

New Jersey v. Martin, 115 F2d 968, 973;

W. H. Atkinson Co. v. Brown, 300 NW (Mich) 102, 103.

The judgment

"is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, *but as to any other admissible matter which might* have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not present in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed. The language, therefore, which is often used, that a judgment estops not only to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law, upon any ground whatever." (Emphasis supplied.)

Cromwell v. County of Sac, 94 US 351, 24 L Ed 195, 197;

New Orleans v. Citizens Bank, 167 US 371, 396, 398.

SIXTH PROPOSITION.

THE ORDER OF SALE (PR 388-389) OF JUNE 29, 1954, ERRONEOUSLY ALLOWED INTEREST ON CLAIMED DELINQUENT TAXES ALTHOUGH APPELLEE'S TAX ORDINANCES FIXED NO RATE OF INTEREST PAYABLE THEREON; ERRONEOUSLY ALLOWED APPELLEE AN ATTORNEY FEE CONTRARY TO LAW AND DESPITE THE TRIAL COURT AGAIN FOUND APPELLEE HAD COMMITTED "A LOT OF IRREGULARITIES" (PR 462); ERRONEOUSLY CREDITED UPON APPELLEE'S CLAIMED TAXES AT ITS CLAIMED VALUATIONS AND COSTS THE $719.94 ALLOWED AS COSTS TO APPELLANTS IN THIS HONORABLE COURT'S MANDATE OF AUGUST 19, 1953 (PR 335-337); AND ERRONEOUSLY APPLIED, CONTRARY TO APPELLANTS' INSTRUCTIONS WHEN PAYING THEM, APPELLANTS' PAYMENTS OF $1751.75 ON DECEMBER 10, 1949, IN SUCH MANNER AS SATISFIED APPELLEE'S CLAIMED TAXES AT ITS CLAIMED VALUES OF PERSONAL PROPERTY AND TO LEAVE UNSATISFIED APPELLEE'S CLAIMED TAXES AT ITS CLAIMED VALUES OF REAL PROPERTY, WHICH PAYMENTS WERE RECEIVED, RETAINED AND NOT RETURNED BY APPELLEE (Points 21, 25, 15, 26).

1. The Order of Sale (PR 388-389) held Appellants are "delinquent for a balance due of real property taxes in the sum of $1,988.29 since December 15, 1949, plus penalty of 12% thereon, plus interest on such delinquent tax at the rate of 1% monthly."

This $1,988.29 was taken from the pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369), neither from the document (PR 347), produced with Henry's deposition (PR 345-350), wherein no tax figure is shown other than $3,755.00 under the column headed "Tax" on the line opposite "Total", nor from the Supplemental Duplicate Delinquent Tax Roll (PR 10, 13), wherein the combined realty and personalty taxes are shown at $1909.38,

which Tax Roll (PR 10, 13) this Honorable Court held invalid in its Opinion of July 8, 1953 (206 F2d 612).

Sec. 16-1-112, ACLA 1949 (Bf. 13,455, pp. 4-5), authorizes Appellee's Board of Trustees "to impose, fix and provide for the collection of penalties for non-payment of taxes when due, not to exceed 15% of such tax, and to fix the rate of interest on delinquent taxes and penalties, not to exceed 12% per annum."

That section as well as Sections 16-1-111 through 131, Secs. 16-1-35, 16-1-54, 16-1-63, 16-1-65, 16-4-1, and 48-1-1, ACLA 1949 (Bf. 13,455, pp. 4-22), were extended to Appellee, which is a second class Alaskan municipality, by the 6th Paragraph, Sec. 16-2-5, ACLA 1949 (Bf. 13,455, pp. 2-3).

Sec. 12, Municipal Ordinance (PR 94), provides: "On all delinquent taxes a penalty shall be added, which shall be at a sum equal to interest at the rate of 12% per annum from the date of such delinquency."

Appellee's Municipal Tax Ordinances (PR 85-105), nowhere else impose or fix either interest or penalty upon delinquent taxes.

The quoted Section is ambiguous, hence should be construed most favorably to Appellants.

> "In taxing statutes, doubts are resolved against the government."
>
> 51 *Am Jur,* p. 616, Sec. 650;
>
> *Gould v. Gould,* 245 US 151, 153;
>
> *U. S. v. Merriam,* 263 US 179, 187-188.

At most under the quoted section, only 12% per annum from the date of delinquency can be allowed upon legally listed and assessed taxes if any are delinquent which there are not.

2. The Order of Sale (PR 389) allowed "Costs of this hearing, including an attorney's fee to applicant of $748.06 as for contested lien cases according to local rule No. 45."

This Honorable Court held this proceeding to be a special proceeding. 206 F2d 612.

Sec. 16-1-125, ACLA 1949 (Bf. 13,455, p. 12), provides for the allowance of *"the costs of publication of notice and hearing before the Court."*

It makes no mention of an attorney's fee; hence, no attorney fee is allowable to become a lien upon Appellant Yakutat & Southern Railway's realty. Costs of hearing undoubtedly mean witness fees and expenses of depositions, not attorney's fee for preparing application, notices, proofs thereof, and in this instance the pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370).

The right to recover costs, including attorney fees, is statutory.

Mutual, etc., Ass'n. v. Moyer, 94 F2d 906 (CCA 9), 9 Alaska Reports, 235, 240 cert. den. 304 US 581;

United Benefit Life Ins. Co. v. Elliott, et al., 11 Alaska Reports 466, 476.

Alaska has a general statute, no other, under which an attorney fee can be allowed as an item of costs, viz.:

> "Disbursements allowed to party entitled to costs. Party's right to witness' and attorney's fees. A party entitled to costs shall also be allowed for all necessary disbursements, * * * and a reasonable attorney's fee to be fixed by the Court."
>
> *ACLA* 1949, Sec. 55-11-55.

"And a reasonable attorney's fee to be fixed by the Court" was included in that statute by amendment in 1947.

ASL 1947, Ch. 84.

The same words in Sec. 1, Ch. 38, ASL 1923, were construed by this Honorable Court in

Pond v. Goldstein, 41 F2d 76, 5 AFR 544, 556;
Forno v. Coyle, 75 F2d 692, 5 AFR 758, 766.

Inasmuch as this is a "special proceeding", Appellants submit that, without specific statutory provision, costs, as stated, do not include an attorney's fee.

The trial Court allowed attorney fees herein to Appellee although, in its Memorandum Decision (PR 383), it said "the procedure adopted by the City may be somewhat *irregular"* and on July 28, 1954, "I know there have been a *lot of irregularities here. There naturally would be"* (PR 462), (emphasis supplied), and, previously in respect to the trial of January 18, 1952, "No attorney fee was allowed because of irregu-

larities on the part of Yakutat of the kind that encourage litigation" (PR 30).

It should be borne in mind that although Appellee may be a small village and a second class Alaskan municipality, it has throughout been represented by learned practicing counsel, William L. Paul, Jr., of Juneau and Seattle, and Frederick Paul of Seattle. This proceeding, no more than the suit No. 6302-A, which resulted unsuccessfully to Appellee (PR 157), was not instituted by men ignorant of or unlearned in the law.

The allowed attorney fee of $748.06 was based upon the fee allowed as in contested lien cases under Local Rule 45, actually under Rule 45 of Uniform Rules of the District Court for the District of Alaska, effective April 30, 1953, adopted by all the District Judges of Alaska. It provides for allowance in a contested lien case of 30% on first $1000, 15% on next $4,000, and 5% on next $5000, etc.

Appellants don't know how the $748.06 was computed, but assuming without conceding delinquent taxes of $1988.29 plus $239.78 (12% penalty on $1988.29) plus $1082.91, interest at 1% monthly on $1988.29 from December 15, 1949, to June 29, 1954, the date of the Order of Sale (PR 388-389) the correct total is $3310.98, under Rule 45 and the fee would amount to $646.65 not $748.06. If the computation is based upon $1988.29 plus $239.78 plus $1189.71 interest at said rate for said period on $2228.07 (taxes $1988.29 plus penalty $239.78) or upon a total of $3427.78, it would result in $664.68 not $748.06.

However it was computed, Appellants submit the trial Court abused its discretion in allowing it in the face of the many irregularities committed by Appellee and that the statutes do not authorize its imposition as a lien upon Appellant Yakutat & Southern Railway's realty.

3. The Order of Sale (PR 389), after holding Appellants delinquent for $1,988.29 realty taxes, plus 12% penalty thereon, plus 1% interest monthly on said taxes, plus costs of hearing, including an attorney's fee of $748.06, said "Against which sums Objectors shall have a credit, $719.94, for costs taxed on the Objectors' appeal to the Court of Appeals."

The trial Court had previously ruled, in denying Appellee's Objections (PR 340) to Appellants' Motion (PR 337-338) to file and for judgment on this Court's Mandate (PR 335-337), that: "The costs taxed by the Appellate Court against the City Applicant cannot be applied or credited by the Applicant upon the taxes, personal or realty, penalty and interest, or any part thereof, which Applicant claims are due to it from the Objectors" (PR 342-343).

In those Objections (PR 340) Appellee had represented to the Court that "in conformity with" this Honorable Court's Opinion of July 8, 1953 (206 F2d 612), it had "applied the funds paid by objectors to the payment of their personal property taxes and their real property taxes, both including penalty and interest, thereby exhausting any liability due on personal property taxes, penalty and interest, and partially paying their real property taxes, *as had theretofore*

been directed by Objectors'' (PR 340). (Emphasis supplied.)

Appellants have found no such direction in this Honorable Court's Opinion, nor did they ever direct such payment.

That $719.94 is a direct liability of Appellee to Appellants. The trial Court itself held that Appellants were not personally liable for realty taxes in its Opinion in District Court Case No. 6302-A (PR 160).

4. The Order of Sale (PR 388-389) inferentially, although not specifically so stating, approved Appellee's application of the $1751.75, which Appellant paid Appellee by its *attorney's personal check* with his letter of December 7, 1949, to Appellee's City Clerk (PR 143-145) which Appellee never denied (PR 146), to payment of personalty taxes alone in the manner stated by its counsel on April 28, 1954 (PR 411) or as stated in Appellee's Objections to Form of Judgment (PR 340), because Appellee in its pretended Amended Supplemental Delinquent Tax Roll for 1949, which was made by Appellee's counsel after making those Objections, claims only realty taxes in the sum of 1988.29, and the trial Court based its Memorandum Decision (PR 382-383) and its Order of Sale (PR 388-389) upon that pretended Tax Roll (PR 369-370).

Appellee never denied that its City Clerk on December 10, 1949, acknowledged receipt of that check (PR 145) and that its Treasurer endorsed, presented, and received payment of that check (PR 156-157).

On the document (PR 347) under the columns headed "Date Payment", in the section headed "1949", on the line opposite "Land", not on the line opposite "Personal", are written the words: "Dec. 12, 1949, $1751.75".

In his letter of December 7, 1949, Appellants' counsel stated that he remitted that check *in full payment of the current year's municipal taxes levied upon the real and personal property of Appellants in accordance with their respective tax returns* previously sent to and acknowledged by the City Clerk (PR 143-144).

The current tax year necessarily was that of 1949 because Sec. 2, Municipal Ordinance (PR 86), ordained Appellee's annual tax year to commence on June first, and, as stated, the document (PR 347) shows it was received for 1949 taxes.

Appellants submit that Appellee, by receiving, collecting and retaining the proceeds of their attorney's check for $1751.75, remitted to it upon the condition that the $1751.75 was in full payment of their 1949 taxes, is estopped to maintain that any taxes, either realty or personalty, remain unpaid for the tax year 1949 or to apply the proceeds of that check in any manner other than as directed in their counsel's letter of December 7, 1949 (PR 143-144).

Appellants had the right to direct the manner of application of its payment of $1751.75.

> "In making a payment on account of taxes, the taxpayer has a right to direct its application to a particular tax or to a particular piece or item of

property, and the receiving officer is bound by such direction."

84 CJS 1250, Taxation, Sec. 627;

61 CJ 970, Taxation, Sec. 1250.

"When a debtor directs the manner of application of his payment, the creditor, if he accepts payment, must apply it as the debtor requests."

48 CJ 646, Payment, Sec. 90;

70 CJS 261, Payment, Sec. 55.

Appellee should have refunded the $1751.75 if it did not accept that sum in full payment of Appellants' 1949 taxes.

CONCLUSION.

Wherefore Appellants pray that the Order of Sale (PR 388-389) may be vacated and set aside and the application dismissed because:

1. Appellants were not given a fair, impartial hearing or accorded due process of law or fair opportunity to present their objections and adduce their evidence in support thereof at either the January 12, 1952, hearing or the June 24, 1954, hearing (First Proposition, supra; also, Bf. 13,455, pp. 51-63).

2. The trial Court was without jurisdiction because of Appellee's nonperformance of statutory and municipal ordinance requirements in respect both to the Supplemental Duplicate Delinquent Tax Roll (PR 10, 13), which this Court held invalid in its Opinion of July 8, 1953 (206 F2d 612), and the pretended

Amended Supplemental Tax Roll for 1949 (PR 369-370); also, the document (PR 347). (Second Proposition, supra; also Bf. 13,455, pp. 64-68).

3. The Order of Sale of June 29, 1954 (PR 388-389), as did the Order of Sale (PR 50-51) of April 25, 1952, disregards uncontradicted, unimpeached, competent evidence and its weight and credibility, and is based upon an ex parte affidavit and other incompetent evidence, including Henry's deposition, testamentary and documentary (PR 345-350), and ignores Appellee's failure to prove the listing and assessing by the City Assessor for the tax year commencing June 1, 1949, at their respective true and full values either the realty or the personalty of Appellants (Third Proposition, supra; also Bf. 13,455, pp. 78-86).

4. Appellee's witness Henry's evidence, testamentary and documentary (PR 345-350), was incompetent and inadmissible to extrinsically either impeach or show facts not disclosed by either the Supplemental Duplicate Delinquent Tax Roll (PR 50, 51), which this Honorable Court held was invalid in its Opinion of July 8, 1953 (206 F2d 616), or the pretended Amended Supplemental Delinquent Tax Roll for 1949 (Fourth Proposition, supra).

5. The trial Court was without jurisdiction to try this proceeding de novo, and this Honorable Court's mandate (PR 335-337) of August 19, 1953, issued in Case No. 13,455, and the trial Court's judgment on mandate (PR 339) are res judicata, and this Honor-

able Court's opinion of July 8, 1953, in Case No. 13,455, is the law of the case (Fifth Proposition, supra).

6. The Order of Sale (PR 388-389) of June 29, 1954, erroneously allowed interest on claimed delinquent taxes; allowed Appellee an attorney fee and made it a tax lien on Appellant Yakutat & Southern Railway's realty; credited the $719.94, allowed by this Court to Appellants as costs in its Mandate (PR 335-337) of August 19, 1953, upon Appellee's claimed taxes at its claimed valuations, penalty, interest, and costs; and inferentially applied, contrary to Appellants' instructions, their payment of December 10, 1949, to Appellee of $1751.75, which Appellee retained, in a manner selected by Appellee (Sixth Proposition, supra).

Dated, Juneau, Alaska,
February 28, 1955.

Respectfully submitted,
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Attorneys for Appellants.